



::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,



द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

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AS

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. V2/236,237,251,253/BVR/2017	मूल आदेश सं / O.I.O. No. 52/AC/Rural/BVR/RR/2016-17	दिनांक / Date 06.03.2017
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ख अपील आदेश संख्या (Order-In-Appeal No.):

BHV-EXCUS-000-APP-181-TO-184-2017-18

आदेश का दिनांक / Date of Order:	08.03.2018	जारी करने की तारीख / Date of issue:	15.03.2018
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Passed by **Shri Gopi Nath, Additional Director General (Audit), Ahmedabad Zonal Unit, Ahmedabad.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री गोपी नाथ, अपर महानिदेशक ऑडिट, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा ८५, केन्द्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है.

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Gopi Nath, Additional Director General of Audit, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

- ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :
- घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellants & Respondent :-**
- 1.M/s Guru Ashish Ship Breakers,, "UB Aggarwal House",, 2291/2292-A/1, Hill Drive, Bhavnagar - 364 002.
 2. Shri Sukesh Balkrishna Aggarwal, Partner of M/s Guru Ashish Ship Breakers.,
 3. Shri Kishorbhai A. Patel Prop. Of Shree Krishna Enterprises, Bhavnagar
 4. Shri. Vinodbhai Amarshibhai Patel, Plot No. 20 , Santosh Park Society, Subhash Nagar, Bhavnagar

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

- (A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-
- (i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.
- (ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above



- (iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs. 10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

- (B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी।

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टैट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

- धारा 11 डी के अंतर्गत रकम
- सेनवेट जमा की ली गई गलत राशि
- सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा।

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.

Under Central Excise and Service Tax, "Duty Demanded" shall include :

- amount determined under Section 11 D;
- amount of erroneous Cenvat Credit taken;
- amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance [No.2] Act, 2014.



(C) **भारत सरकार को पुनरीक्षण आवेदन :**

Revision application to Government of India:

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

- (i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। /
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse
- (ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of an excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
- (iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- (iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं। /
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
- (v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-in-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पटी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
- (G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलाधी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in



:: Order-in-Appeal ::

Sr. No.	Name of the Appellant	Address	Appellant No.	Appeal No.
01	M/s. Guru Ashish Ship Breaking	Plot No. 128, Ship Breaking Yard, Alang, Dist. Bhavnagar-364081. And; 206, Madhav Darshan, Waghawadi Road, Dist. Bhavnagar-364150. And; 'UB Aggarwal House', 2291/2292-A/1, Hill Drive, Bhavnagar-364001.	No. 1	236/BVR/2017
02	Shri Sukesh Balkrishna Aggarwal, Partner of M/s. Guru Ashish Ship Breaking	Plot No. 128, Ship Breaking Yard, Alang, Dist. Bhavnagar-364081. And; 'UB Aggarwal House', 2291/2292-A/1, Hill Drive, Bhavnagar-364001.	No. 2	237/BVR/2017
03	Shri Vinod Ambrishbhai Patel	Plot No. 20, Santosh Park Society, Subhash Nagar, Bhavnagar. And; Plot No. 102, Escon Mega City, Opp. Victoria Park, Bhavnagar-364002.	No. 3	251/BVR/2017
04	Shri Kishore Ambrishbhai Patel, Proprietor of M/s. Shree Krishna Enterprise	Plot No. 20, Santosh Park Society, Subhash Nagar, Bhavnagar. And; 304, Shopper's Point, Parimal Chowk, Waghawadi Road, Bhavnagar-364001.	No. 4	253/BVR/2017

The present appeals have been filed by the above mentioned appellants against the Order-in-Original No. 52/AC/Rural/BVR/RR/2016-17 dated 06.03.2017 passed by the Assistant Commissioner, Central Excise, Bhavnagar (hereinafter referred to as the adjudicating authority).

2. Briefly stated, the Directorate General of Central Excise Intelligence (here-in-after referred to as the 'DGCEI' for brevity) of Ahmedabad Zonal Unit gathered an intelligence that the ship breaking units of Alang, Dist. Bhavnagar, Gujarat were engaged in large scale evasion of Central Excise duty by way of (i) clandestine removal of plates and scrap to various rolling mills, traders etc. and (ii) undervaluation of plates and scrap obtained out of ship breaking. It was also gathered that the ship breakers had carried out said modus with the help of various brokers and commission agents, who issued fake Cenvat invoices without physical supply of goods, adjusted financial entries, arranged for fictitious transport documents, weightment slips, etc. to fabricate the trails of documents and to mislead the enforcement agencies.

3. Based on the same, the residential premise of Vinod Ambrishbhai Patel was searched under Panchnama dated 30.03.2010 and some diaries, loose papers etc. were resumed. Thereafter statements of Shri Vinod Ambrishbhai Patel and Shri Kishore Ambrishbhai Patel were recorded under the provisions of Section 14 of the Central



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Excise Act, 1944. Further, documents resumed from the said two brothers were also confronted with Shri Sukesh Balkrishna Aggarwal, Partner of M/s. Guru Ashish Ship Breaking, Plot No. 128, Ship Breaking Yard, Alang, Dist. Bhavnagar (Gujarat), and his statements were also recorded. After completion of inquiry it was observed that the appellants have evaded Central Excise duty by way of clandestine removal of dutiable goods and by way of undervaluing their final products. So, a Show Cause Notice F.No. DGCEI/AZU/36-86/2013-14 dated 05.08.2013 was issued to (i) M/s. Guru Ashish Ship Breaking, Bhavnagar requiring them to show cause as to why the Central Excise duty of Rs. 15,98,759/- (Rs. 18,051/- on account of clandestine removal of dutiable goods and Rs. 15,80,708/- on account of undervaluation of dutiable final goods) should not be recovered from them under proviso to erstwhile sub-section (1) of Section 11A [thereafter substituted as Section 11A(4)] of Central Excise Act, 1944 alongwith Interest and imposition of Penalty under Section 11AC [thereafter substituted as Section 11AC(1)(a)] of Central Excise Act, 1944 and under Rule 25 of the Central Excise Rules, 2002 (ii) Shri Sukesh Balkrishna Aggarwal, Partner of M/s. Guru Ashish Ship Breaking, and Shri Vinod Ambrishbhai Patel and Shri Kishore Ambrishbhai Patel, all of Bhavnagar were called upon to show cause as to why the Penalty under Rule 26(1) of the Central Excise Rules, 2002 should not be imposed upon them. The SCN was adjudicated by the Assistant Commissioner, Central Excise, Bhavnagar vide Order-in-Original No. 52/AC/Rural/BVR/RR/2016-17 dated 06.03.2017, who confirmed the demand of duty alongwith interest and also imposed penalties, as proposed in the SCN. However, the above mentioned appellants aggrieved by the impugned order. Hence these appeals.

4. With regard to confirmation of Central Excise duty of Rs. 18,051/- on account of clandestine removal of dutiable goods and Rs. 15,80,708/- on account of undervaluation along with appropriate interest and imposition of penalty of Rs. 15,98,759/- under Section 11AC read with Rule 25 of the Central Excise Rules, 2002, M/s. Guru Ashish Ship Breaking, Bhavnagar mainly contended that-

(a) The adjudicating authority had not considered the reply submitted before him and the order passed by him is non-speaking and non-reasoned order. Therefore, the same may be illegal, invalid and liable to be quashed.

(b) The clandestine removal has to be proved by production of affirmative, positive and tangible evidences and not to be alleged on the basis of inference and reference. The charges of clandestine removal are serious and it cannot be established on the basis of data retrieved from the pen drive of unverified nature. The onus to prove clandestine removal is on the department.

(c) No statements of drivers or owners of the trucks have been recorded. No statements of buyers / purchasers were recorded. No corroborative evidences are available about receipt of cash amount. And, no corroborative evidences are available to prove that the transactions recorded in the diaries maintained by Shri Vinod Ambrishbhai Patel, broker, were correct. Apart from the diaries, which is not carrying much evidentiary value, there is nothing on record to establish clandestine removal.

(d) The entries made in diary no. A/10 and in MS Excel Sheet named as Radisson 30-09-10, retrieved by the DFS from the pen drive resumed from Shri Vinod Ambrishbhai Patel might be of inquiry of rate and quantity etc. There is a practice in the ship breaking industry that brokers are inquiring the rates etc. over phone. Further, neither Shri Vinod Patel nor Shri Sukesh Balkrishna Aggarwal have confessed the clandestine removal.



(e) As per the Indian Evidence Act, the burden of proof lies on the party who contend something. The value and evidences thereof are to be disclosed with reasons and documents by the revenue authority. But, in this case this burden was not correctly discharged.

(f) The deposition made by different persons in their statements are not relevant. None of the transporter had confirmed that they have transported clandestinely removed goods for appellant and none of the purchaser had confessed that the such goods were purchased by them. The appellant has mentioned several judgments in their support.

(h) As regard to duty evasion on account of under valuation of goods, it was submitted that scrap generated from old and used ships were not of similar nature. It depends upon the size, built and usage of the ship. The scrap generated from bigger, non-riveted and less used ships are costlier than that of small, riveted and old ships used for more than 25 years. Further, the types of ship also makes impact on valuation. The other local factors affects the price are (i) size of scrap plates (ii) quantity to be sold or purchased (iii) terms of payment (iv) quality of scrap plates. Further, the prices declared by the agencies were for guidance purpose. The demand of undervaluation was raised on presumption and assumption.

(i) They sold their goods at competitive price and there is no allegation as to transactions were with related persons and the price charged is not the sole consideration. Further sales were made in ordinary course of business. Thus, in absence of any evidence with respect to the money flow back and with the fact that no inquiry at the end of buyers of goods have been made, the prices/values mentioned in the invoices of appellant are to be taken as transaction value. They relied upon on four judgments in this regard.

(j) It is established principle that for imposition of penalty the intension about commission of any offence is to be proved. In absence of any evidence that excisable goods were cleared without payment of duty and by undervaluing them, the question of penalty doesn't arise. That no evidence was adduced in the SCN to establish that the alleged acts or omissions have been deliberately committed by the appellant. And, therefore, no penalty under Section 11AC of the Central Excise Act, 1944 and Rule 25 of the Central Excise Rules, 2002 is imposable when no mala fide intension to evade payment of duty.

5. With regard to imposition of penalty of Rs. 15,98,759/- under Rule 26(1) of the Central Excise Rules, 2002, Shri Sukesh Balkrishna Aggarwal, Partner of M/s. Guru Ashish Ship Breaking, Bhavnagar has contended that-

(a) The adjudicating authority had not considered the reply submitted before him and the order passed by him is non-reasoned order. Further, when the partnership firm is penalized, the partner cannot be penalized. In this regard the appellants relied upon on three decisions.

(b) That the appellants had not acted with personal motive and gain. The penalty could be imposed on the person who acquired possession or otherwise dealt with the excisable goods which was liable for confiscation. Whereas, the appellant had no such belief that the goods was liable for confiscation. Also, the department had not produced any evidence that the appellants have played vital role with relation to evasion of Central Excise duty and closely handled the realization of unaccounted money.



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(c) He had not suppressed any clearance of excisable goods and not removed the same clandestinely with intent to evade payment of duty and also not under-valued the goods. Based on this he requested that no penalty should be imposed upon him.

6. With regard to imposition of penalty of Rs. 18,051/- under Rule 26(1) of the Central Excise Rules, 2002 on each, Shri Vinod Ambrishbhai Patel and Shri Kishore Ambrishbhai Patel, Proprietor of M/s. Shree Krishna Enterprise, Bhavnagar contended that-

(a) No evidence has been produced that the appellants have obtained possession of clandestinely removed goods valued at Rs. 2,19,066/- involving duty of Rs. 18,051/- without proper invoice. No investigation at the end of buyers were conducted and no corroborative evidences are available on record that the appellants have received cash amount. It is improper to penalize them on the basis of diaries maintained for the estimates. That the diary no. A/10 and pen drive recovered from them were nothing but an estimate made by them. That Shri Sukesh Balkrishna Aggarwal, partner of M/s. Guru Ashish Ship Breaking has also not confessed that they have made any clandestine clearance.

(b) They have never transacted with unaccounted cash with any ship breakers or buyers. During the search made by the department, no such unaccounted cash was found.

(c) They requested for supply of Relied Upon Documents, but the same was not acceded to. They asked for soft copies of RUDs. But they were not provided the same. Further, they were also not provided hard copy of RUDs. The department cannot expect a reply from the appellants without supplying of RUDs.

(d) The adjudicating authority had not considered the reply submitted by them and ignored the judgments put forth by them. In this way the order passed by the adjudicating authority was non-speaking and non-reasoned. It is not the case that the appellants have not co-operated. They have cooperated during the investigation and gave true and correct statements. They have not given any evasive reply.

(e) That the appellants are not covered under Rule 26(1), as they have not dealt with any excisable goods in any manner. They have only introduced purchaser. For imposition of penalty, the possession of excisable goods with knowledge or belief that the same is liable for confiscation under the Central Excise Act is required or the person have concerned himself in transportation, removing, depositing, keeping, concealing, selling or purchasing or has in any manner dealt with excisable goods with such knowledge or belief.

7. Hearing for appeals filed by the appellant nos. 1, 2, 3, and 4 was held on 21.02.2018, which was attended by Shri M. N. Vadodariya, Consultant and Chartered Accountant. During the hearing he reiterated the submissions made in the respective appeal memos and submitted additional submission dated 21.02.2018 for consideration and requested to drop the impugned order passed by the adjudicating authority.

8. I have carefully gone through the facts of the case, impugned adjudication order, appeal memos and submissions made during the personal hearing. From which, I found following issues to be decided by me in this order.



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- (i) Whether the clandestine removal of excisable goods have been made and subsequently whether M/s. Guru Ashish Ship Breaking, Bhavnagar are liable for payment of duty along with interest and penalties or otherwise;
 - (ii) Whether the excisable goods have been undervalued at the time of their removal by the appellant viz. M/s. Guru Ashish Ship Breaking, Bhavnagar, and;
 - (iii) Whether, the other appellants have indulged themselves in clandestine removal of excisable goods and subsequently made liable themselves for penalty or otherwise.

9. I find that the officers of DGCEI, Ahmedabad conducted a coordinated search at the places of various brokers and transporters, from where incriminating documents like various diaries, files, loose papers, compact disk, pen drive, etc. and lorry receipts, booking / trip registers etc. were resumed. Further, searches were also conducted at the premises of ship breaking units. During preliminary inquiry of the records resumed, the intelligence gathered was validated and therefore detailed inquiry was carried out.

10. With regard to the demand of duty of Rs. 18,051/- on account of clandestine removal of scrap, M/s. Guru Ashish Ship Breaking had submitted that the adjudicating authority had not considered the reply submitted before him and the clandestine removal has to be proved by production of affirmative, positive and tangible evidences. No statements of drivers or owners of the trucks have been recorded. No statements of buyers / purchasers were recorded. They have also raised question that no corroborative evidences are available about receipt of cash amount and, no corroborative evidences are available to prove that the transactions recorded in the diaries maintained by Shri Vinod Ambrishbhai Patel, broker, were correct. For the same I find that the inquiry was conducted with respect to data contained in the diaries, computer, laptop, hard disk, pen drive, etc. seized from the residence of Shri Vinod Ambrishbhai Patel and Shri Kishore Ambrishbhai Patel. On conducting forensic analysis of the electronic storage devices, it stipulated clear details of transactions of sales and purchase of ship breaking materials viz. scrap of propeller and stainless steel. Further, the details contained in these devices were tallied and found correct with the details narrated in the diaries resumed from the residence of Shri Vinod Ambrishbhai Patel and Shri Kishore Ambrishbhai Patel. It is important to note here that the diary no. A/10 contained the details of goods purchased, plot number of ship breakers, date of transactions etc. and the details have been narrated on both "Dr" Debit as well as "Cr" Credit side of the diary. So, it is proved that the allegation of clandestine removal of dutiable goods have been clearly supported and corroborated by the evidences.

10.1 Further, the appellant argued that the entries made in diary no. A/10 and in MS Excel Sheet named as Radisson 30-09-10, retrieved by the DFS from the pen drive might be of inquiry of rate and quantity etc. Further, neither Shri Vinod Ambrishbhai Patel nor Shri Sukesh Balkrishna Aggarwal have confessed the clandestine removal. For the same, I find that no man of a prudence mind note down such transactions with exact details on his own and without completion of the transactions. It was seen that the amount was also shown after deducting last three digits of the transactions. This showed that there were enough evidences against the appellant, which can be admissible under the Indian Evidence Act, and thus the department had proved that the appellant was indulged in clandestine removal of goods. As such the case was clearly proved against the appellant there was no need to record the evidences at the end of buyers and transporters etc. Even otherwise, it is settled law that in cases of clandestine removal, department is not required to prove the case with mathematical precision. My view are duly supported by judgment of the Apex Court in the case of Collector of Customs, Madras and Others Vs. D. Bhoomull - 1983 (13) E.L.T. 1546 (S.C.), wherein it was held that -

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30. It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, or universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it- "all exactness is a fake". El Dorado of absolute Proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in *Blatch v. Archer* (1774) 1 Cowp. 63 at p. 65 "According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden".

10.2 Regarding demand of duty on the basis of dairies recovered from brokers, Shri Vinod Ambrishbhai Patel and Shri Kishore Ambrishbhai Patel, it has been contended by the appellant that the demand made on the basis of third party documents is not sustainable. In this regard, I find that in the dairies maintained by the brokers, licit and as well as illicit transactions of the appellant are recorded. It is found that the transactions recorded in the dairies also tallies with the data stored in the electronic storage devices. Further, Shri Sukesh Balkrishna Aggarwal, Partner of the appellant firm agreed that wherever "128" is written in the dairies found from the residence of Shri Vinod Ambrishbhai Patel and Shri Kishore Ambrishbhai Patel have indicated of Plot No. 128 i.e. the plot of appellant firm. Thus, the authenticity of the dairies and other records recovered from the brokers is established. Thus, the case is based not only on third party documents but duly corroborated by other evidences. Such statements have never been retracted and hence have evidentiary value. Further, combined study of all such evidences reflected that the evasion has taken place and appellant have indulged in it. So, in this case the third party evidence can be admitted. It appeared that all transactions were recorded in ciphered and coded manner, and the case was made out after deciphering and decoding the same. Further, Shri Vinod Ambrishbhai Patel and Shri Kishore Ambrishbhai Patel had also not cooperated during the inquiry. The transactions recorded in dairies and storage devices seized from them were further corroborated with relevant record. Therefore, these are considered as vital and crucial evidences as per the Indian Evidence Act, 1872 and they are sufficient to prove the case made out against the appellant.

10.3 In view of the above, I find that the arguments put forth by the appellant is of no help to them and department has adduced enough evidence to show that the appellant was engaged in clandestine removal of the goods and therefore, the case laws cited by the



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appellant are also of no help to them, as facts of the present case clearly shows evidences that the appellant was engaged in evasion of duty by way of clandestine removal of their goods.

11. Regarding allegation of undervaluation, it has been contended that they were clearing the scrap at competitive rate and based on material emerging from breaking of the ship and thus the valuation was dependent on many factors like age of ship, quality of material etc. and therefore the price published by M/s. Major and Minors cannot be taken in the era of assessment based on transaction value. The department has also not proved receipt of money from buyers over and above invoice value. In this regard, I find that statements of various angadia were recorded, wherein it was clearly transpired that the transactions in unaccounted cash over and above the invoice value took place. The appellant have not challenged receipt of cash either through brokers or through angadia. Thus, department has proved receipt of money over and above invoice value. Further, the price adopted by DGCEI is also relied upon by most of the ship breaking yards of Alang and the goods emerging out of breaking up of ship is sold at or about the same rate. I find that in order to be just and fair, the investigation has also allowed variation up to 2% in the price published by Major and Minors. Thus, I find that it is not a case where flow back of money or receipt of consideration over and above invoice value is not established. It is but natural that in a case where the assessee is engaged in clandestine clearance as well as undervaluation of goods produced by them, no one can establish one-to-one correlation of goods sold and payments received in cash or through angadia. In my view, it is sufficient evidence that as per the dairies recovered from brokers, cash transactions took place between various rolling mills/furnace units and the appellant through the brokers and hence it can be said that the appellant received some payment in cash over and above invoice value through illegal channels. Therefore, I find that the rejection of transaction value and replacement of the same by the price prevailing is correct in view of Valuation Rules as well as section 4 of the Central Excise Act, 1944.

11.1 In view of the above, it is proved that M/s. Guru Ashish Ship Breaking, Bhavnagar have evaded payment of Central Excise duty by way of clandestine removal of goods as well as by undervaluation of the goods. Therefore, I find that the order of adjudicating authority is proper and is required to be upheld.

12. Shri Sukesh Balkrishna Aggarwal, Partner of M/s. Guru Ashish Ship Breaking, Bhavnagar has contended that they have not played vital role in the case and that when partnership firm is penalized, no penalty can be imposed upon partners. They have cited some case laws also in support of their contention. In this regard I find that in case of M/s. N. Chittaranjan Vs CESTAT, Chennai - 2017 (350) ELT 78 (Mad.), Hon. High Court has held that looking to the facts of each case, separate penalty can be imposed upon partner of partnership firm, even if the firm is penalized. Therefore, I find that the case laws cited by them is of no help to them. Further, coming to the role played by him, I find that he was the key person of the appellant firm and was directly involved in clandestine removal of goods as well as undervaluation of the goods manufactured by his firm. He was looking after the day-to-day functions of M/s. Guru Ashish Ship Breaking, Bhavnagar and was concerned himself in all matters related to excisable goods, including manufacture, storage, removal, transportation, selling etc. of such goods, which he knew or has reason to believe that were liable for confiscation under the Central Excise Act, 1944 and the rules made there under. His role is discussed in detail in the OIO passed by the adjudicating authority, as per which he agreed in his statement dated 16.07.2013 that he was knowing that M/s. Guru Ashish Ship Breaking had sold scrap of propeller and stainless steel through Shri Vinod Ambrishbhai Patel and Shri Kishore Ambrishbhai



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Patel. Further, he confirmed that the details mentioned on Page No. 138 of diary no. A/10, seized from Shri Vinod Patel and Shri Kishore Patel matches with the Invoice No. 1496 dated 04.03.2009 issued by M/s. Guru Ashish Ship Breaking. He further agreed that wherever "128" have been mentioned in the diaries maintained by Shri Vinod Patel and Shri Kishore Patel, it pertain to his firm i.e. M/s. Guru Ashish Ship Breaking, Bhavnagar. Looking to his involvement in the case and gravity, I find that imposition of penalty upon both of them under Rule 26 of the Central Excise Rules, 2002 is proper and justified.

13. Coming to the penalties imposed upon Shri Vinod Ambrishbhai Patel and Shri Kishore Ambrishbhai Patel, brokers in the case, they have contended that they have not dealt with the goods in the manner prescribed under Rule 26 of the Central Excise Rules, 2002 and therefore not liable to penalty. In this regard, I find that the diaries maintained by Shri Vinod Ambrishbhai Patel were in coded language contained details of licit and illicit clearances of the appellant firm. When asked about the same, both have provided evasive replies like, the accounts were imaginary or the figures are hypothetical etc. They never decoded or co-operated in the investigation. However, by immense efforts, the agency decoded the data and the whole chapter of clandestine removal was revealed. When these details were confronted with both the brothers, they adopted different strategy to escape punitive actions. The decoded data matched with the data maintained in electronic form. This authenticates the data maintained by Shri Vinod Ambrishbhai Patel. When asked for, Shri Vinod Patel replied that he had nothing to do with activities of M/s. Shree Krishna Enterprise. His brother, Shri Kishore Ambrishbhai Patel was handling business of registered dealer and was involved in facilitating clandestine removal through his dealer firm. The records also showed cash transactions with various buyers and sellers through angadias. Therefore, his role is very much covered under Rule 26 of the Central Excise Rules, 2002. Therefore, penalty imposed by the adjudicating authority is proper and there is no need to interfere with the same.

14. I find that the facts of the case are distinguishable from the judgments relied upon by the appellants in as much as all the documents and data storage devices resumed / collected, analysis thereof have been corroborated with each other. Any of the appellant has not retracted their statements. So, they are valid and legal in the eyes of law. The persons involved in this case have closely monitored, arranged, financed and managed all affairs of clandestine clearances and clearances by way of undervaluation made by M/s. Guru Ashish Ship Breaking, Bhavnagar, and thus played vital role in evasion of Central Excise duty. Instead, I find the following case laws relevant for impugned case.

(a) The statements of the accused, if not retracted, the same is legal and valid in the eyes of law. And the same can be considered as corroborative evidence and no further evidence is required. (i) Naresh J. Sukhawani [1996 (83) ELT 258 (SC)] (ii) Rakesh Kumar Garg [2016 (331) ELT 321 HC-Delhi]

(b) That the evidence or statement or admission or confession is a substantial piece of evidence, which can be used against the maker of it. (i) Commissioner of Central Excise, Mumbai-V Vs. Alex Industries [2008 (230) 073 ELT (Tri. Mumbai)] (ii) M/s. Divine Solutions Vs. Commissioner of Central Excise, Coimbatore [2006 (206) ELT (Tri. Chennai)] (iii) M/s. Karoi Engg. Works Vs. Commissioner of Central Excise, Delhi [2004 (168) ELT 373 (Tri. Delhi)]

(c) Even if the statement was retracted, considering the other facts of the case and corroboration made with other evidences, the same can be relied upon and the persons

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involved can be penalized for their acts. CCE, Mumbai Vs. M/s. Klavert Foods India Pvt. Ltd. [2011-TIOL-76-SC-CX]

(d) The penalty on director of company is imposable, when he was directly involved in the evasion of Central Excise duty. CCE, Surat-I Vs. P.S. Singhvi [2011 (271) ELT 16 (Guj)]

(e) Fraud is a well known vitiates every solemn act. Fraud and Justice never dwell together. Fraud is a conduct either by letter or words and also includes known misrepresentation. Fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including *res judicata*. (i) CC (P) Vs. Aafloat Textiles (India) Pvt. Ltd. [2009 (235) ELT 587 (SC)] and (ii) Ram Chndra Singh Vs. Savitri Devi and Ors. [2003 (8) SCC 319]

(f) Further, it is also settled legal position that once the case of clandestine removal of excisable goods, in the manner it has been executed in the current case is established, it is not necessary to prove the same with mathematical or clinical precision. (i) Madras and Others Vs. D. Bhoormull [1983 (13) ELT 1631 (SC)] and (ii) Shah Guman Mal Vs. State of Andhra Pradesh [1983 (13) ELT 1546 (SC)]

15. In view of the above, I uphold the order passed by the adjudicating authority and reject the appeals filed by the appellants.

16. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है। / The appeals filed by the appellants stands disposed off in above manner.

Handwritten signature and date: 15/03/2018

Handwritten signature and date: 08/3/18

(गोपी नाथ / Gopi Nath)

आयुक्त (अपील्स) एवं अपर महानिदेशक (लेखा परीक्षा) /
Commissioner (Appeals) & ADG (Audit).

F.No. V2/236,237,251,253/BVR/2017

Date: 08.03.2018

By Regd. / Speed Post A. D.
To,

(i) M/s. Guru Ashish Ship Breaking, Plot No. 128, Ship Breaking Yard, Alang, Dist. Bhavnagar-364081 AND 206, Madhav Darshan, Waghawadi Road, Dist. Bhavnagar-364150 AND 'UB Aggarwal House', 2291/2292-A/1, Hill Drive, Bhavnagar-364001.

(ii) Shri Sukesh Balkrishna Aggarwal, Partner of M/s. Guru Ashish Ship Breaking, Plot No. 128, Ship Breaking Yard, Alang, Dist. Bhavnagar-364081 AND 'UB Aggarwal House', 2291/2292-A/1, Hill Drive, Bhavnagar-364001.

(iii) Shri Vinod Ambrishbhai Patel, Plot No. 20, Santosh Park Society, Subhash Nagar, Bhavnagar AND Plot No. 102, Escon Mega City, Opp. Victoria Park, Bhavnagar-364002.

(iv) Shri Kishore Ambrishbhai Patel, Proprietor of M/s. Shree Krishna Enterprise, Plot No. 20, Santosh Park Society, Subhash Nagar, Bhavnagar AND 304, Shopper's Point, Parimal Chowk, Waghawadi, Bhavnagar-364001.

